Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL "SHAWN" BLANSETT, MODESTA N. BLANSETT, INDIVIDUALLY AND AS NEXT FRIENDS OF MCKENNA BLANSETT AND BLAKE BLANSETT, MINORS,
Petitioners,

v.

CONTINENTAL AIRLINES, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an issue left unresolved in *Olympic Airways v. Husain*, 540 U.S. 644, 124 S. Ct. 1221, 1229 n.9 (2004):

> Does an airline's failure to warn its passengers of the risk of developing deep–vein thrombosis constitute an "accident" under the Warsaw Convention?

PARTIES

Petitioners are Michael "Shawn" Blansett, Modesta N. Blansett, Individually and as next friends of McKenna Blansett and Blake Blansett, minors.

Respondent is Continental Airlines, Inc.

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MICHAEL "SHAWN" BLANSETT; MODESTA N. BLANSETT, INDIVIDUALLY AND AS NEXT FRIENDS OF MCKENNA BLANSETT AND BLAKE BLANSETT, MINORS,
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CONTINENTAL AIRLINES, INC.,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported as *Blansett v. Continental Airlines, Inc.*, 379 F.3d 177 (5th Cir. 2004). The opinions of the district court are reported as *Blansett v. Continental Airlines, Inc.*, 246 F. Supp. 2d 596 (S.D. Tex. 2002), and *Blansett v. Continental Airlines, Inc.*, 237 F. Supp. 2d 747 (S.D. Tex. 2002).

BASIS FOR JURISDICTION IN THIS COURT

The court of appeals entered its final judgment on July 21, 2004. This Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

(1) Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929 ("Warsaw Convention"), 49 Stat. 3000, TS 876, Note Following 49 U.S.C. § 40105.[1]

* * *

Chapter III. Liability of the Carrier

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

* * *

ADDITIONAL STATUTES OR OTHER PROVISIONS

The relevant portions of the following statutes and other provisions are reproduced in the appendix:

49 U.S.C. § 44701(a)(5)
14 C.F.R. § 121.1(a)
14 C.F.R. § 121.11
14 C.F.R. § 121.317
14 C.F.R. § 121.535(c)(2)
14 C.F.R. § 121.535(f)

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[1] The Warsaw Convention has been amended by the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB 18900, approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), and Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, signed at Montreal on 25 September 1975, ratified by the United States 1998, reprinted in S. Exec. Rep. No. 105-20 (1998). These amendments do not affect Article 17.

14 C.F.R. § 121.537
14 C.F.R. § 121.571

STATEMENT OF THE CASE

During an international flight from Houston to London, Shawn Blansett suffered a permanently debilitating cerebral stroke, which was caused by a blood clot that formed during the flight. As a result, Shawn is now bound to a wheel chair, unable to walk or talk normally, and unable to take care of his own basic needs. The Blansetts filed suit against Continental Airlines, Inc., alleging that Continental's failure to warn about the risks of developing deep–vein thrombosis (DVT) constitutes an "accident" under the Warsaw Convention. Because the Warsaw Convention is a treaty, the district court exercised federal-question jurisdiction under 28 U.S.C. § 1331.

Continental moved to dismiss the Blansetts' failure-to-warn claim and moved for partial summary judgment. Both motions were denied. The district court ruled that the Blansetts stated a viable claim since Continental's failure to warn of the risk of deep-vein thrombosis was an "accident," because Continental's failure was an "abnormal and unreasonable application of routine procedure, and thus, it was unusual and unexpected." *Blansett v. Cont'l Airlines, Inc.*, 237 F. Supp. 2d 747, 751-52 (S.D. Tex. 2002), *rev'd*, 379 F.3d 177 (5th Cir. 2004). In denying summary judgment, the district court concluded: "An airline's violation of an industry standard of care, alone, can be 'an unusual or unexpected event or happening that is external to the passenger,' . . . and thus, an 'accident.'" *Blansett v. Cont'l Airlines, Inc.*, 246 F. Supp. 2d 596, 601 (S.D. Tex. 2002), *rev'd*, 379 F.3d 177 (5th Cir. 2004). The district court recognized that a contrary ruling "would have the ironic result of rewarding individual airlines for adopting an 'ostrich' approach of failing to institute routine safety procedures in

compliance with generally recognized industry standards of care." *Id.*

The parties filed an agreed motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b) on the question whether the failure to warn a passenger on an international flight about deep-vein thrombosis constitutes an "accident" under the Warsaw Convention. For purposes of this appeal, Continental concedes that warning about the risk of deep-vein thrombosis was standard in the airline industry.

The Fifth Circuit reversed the district court. *Blansett v. Cont'l Airlines, Inc.*, 379 F.3d 177, 182 (5th Cir. 2004). The court of appeals concluded that Continental's failure to warn of the risk of deep–vein thrombosis was not "unusual or unexpected," because warnings were not required by the Federal Aviation Administration. *Id.* As a result, the court held that Shawn Blansett's injury did not constitute an "accident" under the Warsaw Convention.

REASONS FOR GRANTING WRIT

This Court should grant certiorari because the issue is important throughout the world. International air travel affects millions of passengers and scores of airlines. That is why so many nations have signed the Warsaw Convention. Yet courts have not definitively settled whether the failure to warn about the risk of deep-vein thrombosis constitutes an "accident" within the meaning of the Warsaw Convention. The highest courts of England and Australia have recently agreed to consider this issue. *See Deep Vein Thrombosis & Air Travel Group Litig.*, [2003] EWCA Civ. 1005 (July 3, 2003) (leave to appeal granted); *Qantas Ltd. v. Povey*, [2003] VSCA 227, 2003 WL 23000692 (Dec. 23, 2003) (special leave to appeal granted). This Court should decide it, because courts throughout the world have traditionally looked to this Court for guidance about the definition of "accident" under the Warsaw Convention.

The risk of deep-vein thrombosis is present in all lengthy airplane flights. As a result, many airlines warn of the risk of deep-vein thrombosis and advise their passengers how to minimize the risk. The Federal Aviation Administration's website discusses the danger and recommends warnings in great detail. Because not all airlines have provided warnings, however, litigation by injured passengers and their families is pending in other nations and in a multi-district proceeding in California.

The Fifth Circuit's decision, however, distorts the analysis. The court has created a tension between the policies of the FAA and those of other nations. The court held that an airline cannot be liable under the Warsaw Convention for a failure to warn, provided the airline complied with the minimum warnings required by the FAA. Tying liability to local standards conflicts with the power of other nations to set higher standards for flights arriving in or departing from their territories. If other nations require warnings, but the FAA does not, has there been an "accident"? The result is likely to be a Balkanization of the application of the *Saks* definition of "accident," which would contradict a major purpose of the Warsaw Convention—uniformity. To ensure a uniform definition, this Court should resolve this issue.

I. THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Although the Court addressed the definition of "accident" under the Warsaw Convention just last term, this precise issue was not resolved. The Court noted that cases alleging a failure to warn of the risk of deep–vein thrombosis have "substantial factual distinctions" from the allegations at issue in *Olympic Airways v. Husain*, 540 U.S. 644, 124 S. Ct. 1221, 1229 n.9 (2004). Accordingly, except for the Fifth Cir-

cuit's decision in the present case, this issue remains open in America.

A. A uniform interpretation of "accident" under the Warsaw Convention is important to international airlines, their passengers, and courts.

A uniform interpretation of "accident" under the Warsaw Convention would assist the airline industry. It also could resolve many cases pending around the nation and provide guidance to courts around the world.

The Warsaw Convention provides the exclusive cause of action and remedy for those suffering an accident on an international flight. *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 177 (1999). To prevail under article 17 of the Warsaw Convention, a plaintiff must establish that: (1) an *accident* (2) took place on board the aircraft or in the course of operations of embarking or disembarking (3) which caused (4) an injury. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535-36 (1991). An *"accident"* is defined as "[a]n unexpected or unusual event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405 (1985). The definition is to be flexibly applied. *Id.* Whenever there is contradictory evidence, the trier of fact determines whether an "accident" caused the injury. *Id.*

All international long-haul passengers are subject to the risk of developing deep–vein thrombosis, not just those with known risk factors. A peer-reviewed medical study found that as many as 10% of passengers with no history of thromboembolic problems can develop symptoms of deep-vein thrombosis during an eight-hour flight. Shawn Blansett, only thirty-six years old at the time of his stroke, was one of these.

The dangers of deep-vein thrombosis have long been known by the International Air Transport Association ("IATA"), which is the international commercial aviation

industry's trade organization of approximately 275 members, including Continental. In 1986, the IATA included warnings about the risk of deep-vein thrombosis in its medical manual distributed to members. The IATA manual mentioned that "[p]rolonged immobilization on long flights has a noticeable effect on the circulation, especially in the lower limbs." Because "the opportunity for physical exercise is very limited," since aircraft "aisles will be blocked most of the time by cabin personnel serving passengers," IATA recommended that its members encourage their passengers to "take every opportunity to exercise" especially "during intermediate stops." IATA's recommendations, however, went even further: "During flight, passengers should be encouraged to move their feet frequently and exercise the muscles of the legs. When possible, to minimize ankle and feet swelling, the passengers should stand and walk the aisles for a few minutes every hour or so and to elevate the feet as high as possible while sitting."

Several months before Shawn Blansett's flight in 2001, the IATA instructed carriers to inform travelers of the risks of deep-vein thrombosis when the reservation is booked. The IATA also advised carriers to remind their passengers—just before boarding and again while on board—to drink sufficient fluids, wear loose-fitting clothes, avoid smoking and alcoholic beverages, and perform physical exercises in their seats (particularly for their feet and legs).

In accordance with the IATA recommendations, many major international air carriers warned their passengers of the risk of deep-vein thrombosis. These included Air Canada, Air New Zealand, All Nippon Airways, American Airlines, British Airways, Emirates Airlines, Japan Airlines, Northwest Airlines, Qantas, and Singapore Airlines. But Continental did not. As a result, many passengers received warnings and avoided deep-vein thrombosis, while others such as Shawn Blansett did not. Those who were injured as a result of not receiving warnings have initiated litigation around the world.

Given the huge increase in international air travel, both passengers and carriers have an interest in seeing this issue resolved. The courts where litigation is pending also need guidance. This Court should resolve this question.

B. The issue implicates important policies of the Federal Aviation Administration, but the Fifth Circuit's decision needlessly creates tension with the policies of other nations.

The Federal Aviation Administration's website mentions the risk of deep-vein thrombosis and recommends that passengers be warned about it.[2] The website of the FAA's Office of Aerospace Medicine contains multiple links to warnings about deep-vein thrombosis. *See* www.cami.jccbi.gov/aam-400/PassengerHandS.htm#Specifictopics. These links, in turn, discuss preventative measures like those the IATA had recommended prior to Shawn Blansett's injury. *See* www.cami.jccbi.gov/aam-400A/FASMB/FAS200101/DVT.htm.

Nevertheless, the Fifth Circuit has expressed concern about the tension between the recommended precautions against deep–vein thrombosis and the risk of injury to passengers wandering about the cabin. This led the Fifth Circuit in another case to hold that claims of a failure to warn against the risk of deep–vein thrombosis were preempted by the FAA regulations. *Witty v. Delta Airlines, Inc.*, 366 F.3d 380, 385 (5th Cir. 2004). That case was not decided under the Warsaw Convention, because it involved only a domestic flight. But it demonstrates the importance of this issue to airlines and

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[2] The federal courts may take judicial notice on appeal of matters published on the official website of a federal governmental entity or agency. *E.g.*, *Cellco P'ship v. FCC*, 357 F.3d 88, 93, 96 (D.C. Cir. 2004); *Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002).

passengers. Deciding this issue could reconcile that perceived tension within the FAA's policies.

Moreover, the Fifth Circuit's decision has needlessly created a tension between the policies of our government and those of other nations. The Fifth Circuit has limited the definition of "accident"—what is "unusual or unexpected"—to whatever is required by the FAA at a particular point in history. Its logic seems to grant the FAA implied power to define the requirements of the Warsaw Convention. While the FAA certainly can establish minimum standards for international flights arriving in or departing from America, it should not have the power to prevent other nations from requiring higher standards for their flights if they so choose. But the Fifth Circuit's holding says that an airline cannot be liable under the Warsaw Convention, provided it complied with the minimum warnings mandated only by the FAA in America. Thus, even if British law required a warning about deep-vein thrombosis, the failure to warn an American passenger would not be actionable under the Warsaw Convention. And even a British passenger on a flight to or from America could not recover in an American court. This suggests that the Fifth Circuit's opinion may lead to different applications of the definition of "accident" to warnings claims in different nations. Tying liability standards to local law is precisely opposite the intention behind the drafting of the Warsaw Convention.

C. Although the House of Lords and the High Court of Australia have now agreed to address this issue, those courts have traditionally welcomed this Court's guidance.

In deciding what constituted an "accident" in *Olympic Airways v. Husain*, this Court was "hesitant" to follow "the opinions of intermediate appellate courts" of other signatories to the Warsaw Convention, because their courts of last resort

had not yet spoken. 124 S. Ct. at 1229 n.9. Recently, however, both the House of Lords and the High Court of Australia have decided to address whether the failure to warn of the risk of deep–vein thrombosis is an "accident" under the Warsaw Convention.[3]

Although this Court could await the outcome of those decisions, it should not. This Court's decisions have led the analysis of what is an "accident" under the Warsaw Convention. The *Saks* definition of "accident" has been the touchstone for England, Australia, Canada, and Germany in their cases under the Warsaw Convention. Accordingly, those courts would likely welcome the guidance of this Court in resolving this issue, which could restore uniformity to the definition under the treaty.

D. Resolving this issue also would resolve multi-district litigation.

Moreover, the issue whether an airline's failure to warn about the risks of deep–vein thrombosis is currently the subject of multi-district litigation pending in the Northern District of California. A decision on this issue would resolve that litigation with regard to the failure-to-warn claims.

II. THE FIFTH CIRCUIT'S INTERPRETATION OF "ACCIDENT" IS PROBABLY INCORRECT.

The Fifth Circuit held that the failure to warn of the risk of deep-vein thrombosis was not an "accident" under the

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[3] *See Deep Vein Thrombosis & Air Travel Group Litig.*, [2003] EWCA Civ. 1005 (July 3, 2003) (leave to appeal granted, Minutes and Order Paper—Minutes of Proceedings, House of Lords, July 14, 2004 (available at www.publications.parliament.uk/pa/ld200304/minutes/040714/ldminute.htm)); *Qantas Ltd. v. Povey*, [2003] VSCA 227, 2003 WL 23000692 (Dec. 23, 2003) (special leave to appeal granted, Melbourne Sept. 10, 2004 (available at www.hcourt.gov.au/registry/slresults/10-09-04M.htm)).

Warsaw Convention. It reasoned that the failure to warn was not unexpected or unusual, because Continental complied with the FAA's mandated warnings. *Blansett*, 379 F.3d at 182. That reasoning is questionable at best. Its logic suggests that the FAA's regulations impliedly govern international air flights having no relationship to America and, thus, sets up a potential tug of war between what international governments might require under the Warsaw Convention and the minimum warnings mandated by the FAA. *See* I.,B., *supra*.

A better test is whether the external cause of the accident was unexpected or unusual to the *passenger*, for that test fits the purpose of the Warsaw Convention, which was to expand liability in exchange for limiting damages. *E.g.*, *El-Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 505 U.S. 155, 170-71 (1999). That test seems to flow from this Court's logic in *Olympic Airways v. Husain*. There, this Court suggested that the presence of an industry standard was critical to the existence of an "accident." Although this Court did not have to reach that precise question because of the procedural posture of *Husain*, 124 S. Ct. at 1227, it appears that the Court would treat the failure to follow an industry standard as an unexpected or unusual event:

> Suppose that a passenger on a flight inexplicably collapses and stops breathing and that a medical doctor informs the flight crew that the passenger's life could be saved only if the plane lands within one hour. Suppose further that it is industry standard and airline policy to divert a flight to the nearest airport when a passenger otherwise faces imminent death. If the plane is within 30 minutes of a suitable airport, but the crew chooses to continue its cross-country flight, "[t]he notion that this is not an unusual event is staggering."

Id. at 1229 (quoting *McCaskey v. Cont'l Airlines, Inc.*, 159 F. Supp. 2d 562, 574 (S.D. Tex. 2001)).

Thus, according to *Olympic Airways v. Husain*, the failure to follow an industry standard and airline policy can be an unusual event, which constitutes an "accident" when that failure is a link in the causal chain of the ultimate injury. This is as it should be. Passengers should have the right to expect compliance with all industry standards. While they cannot contend that the standard should be improved, since that would impermissibly inject negligence into the case, they should be able to demonstrate that the failure to comply with an industry standard is "unusual and unexpected." Otherwise, the airline has no incentive to prevent injuries that can easily be prevented. Here, a link in the chain causing Shawn Blansett's stroke was Continental's unexpected failure to follow the industry standard of warning about the risks of deep-vein thrombosis, when Continental knew the risk, but Shawn did not.

The presence of an industry standard has led this Court to reject the reasoning of England's and Australia's intermediate appellate courts. *See Olympic Airways v. Husain*, 124 S. Ct. at 1229 n.9 ("To the extent that the precise reasoning used by the courts in *Deep Vein Thrombosis and Air Travel Group Litigation* and *Povey* is inconsistent with our reasoning, we reject the analysis of those cases for the reasons stated in the body of this opinion."). Moreover, even the opinions of those intermediate appellate courts suggested that they might have reached a different result if they had been presented with an established industry standard, as in *Blansett*. *See Deep Vein Thrombosis & Air Travel Group Litig.*, [2003] EWCA Civ. 1005, at ¶ 46 (July 3, 2003) (leave to appeal granted) ("If this was contrary to standard practice, or even the airline's internal practice, then it is perhaps arguable that there occurred an unusual or unexpected 'event.'"). Likewise, the *Povey* decision distinguished *Blansett* on the ground that the latter has an industry standard, while *Povey* did not. *See Qantas Ltd. v. Povey*, [2003] VSCA 227, ¶ 197, 2003

WL 23000692, ¶ 197 (Dec. 23, 2003) (special leave to appeal granted).

Because the IATA and the majority of international air carriers have set a standard for warning about deep-vein thrombosis—and Continental does not dispute the standard for purposes of this appeal—Continental's failure to abide by that standard was unusual or unexpected to the industry, as well as to its passengers such as Shawn Blansett. *See Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 665 (S.D.N.Y. 2001) ("Any major deviation from a standard articulated in recognized practices and procedures represents the exceptional case—the unusual or unexpected happening."). When that deviation causes an injury on board the aircraft, it should constitute an "accident" under the Warsaw Convention. Therefore, the Fifth Circuit's analysis appears incorrect.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Jul. 21, 2004]

Docket No. 03-40545

MICHAEL SHAWN BLANSETT; MODESTA N. BLANSETT, AND AS NEXT FRIEND OF MCKENNA BLANSETT, AS NEXT FRIEND OF BLAKE BLANSETT, INDIVIDUALLY AND MINORS,
Plaintiffs-Appellees
Cross-Appellants,

v.

CONTINENTAL AIRLINES, INC.,
Defendants-Appellant
Cross-Appellee.

Sept. 4, 2003 Argued
May 24 2004 Argued
July 21, 2004 Decided

Before SMITH and DENNIS, *Circuit Judges*, and LYNN,[1] *District Judge*.

OPINION

JERRY E. SMITH, *Circuit Judge:*

I.

On June 18, 2001 plaintiff Michael "Shawn" Blansett traveled from Houston, Texas, to London, England on a flight operated by Continental Airlines, Inc. ("Continental"). During flight, he suffered an episode of deep vein thrombosis

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[1] District Judge of the Northern District of Texas, sitting by designation.

("DVT"), resulting in a cerebral stroke that left him permanently debilitated. DVT involves the clotting of blood in the extremities and creates a threat of death or disability if a clot migrates to the lungs or other vital organs.

The likelihood of a DVT injury is heightened by the pressurized conditions aboard an airliner, especially during long flights, though experts believe that passengers may undertake precautionary measures to reduce the risk. Many international carriers have added DVT warnings to their battery of pre-flight instructions to passengers, though at the time of Blansett's flight, Continental had not. Federal regulations do not require that air carriers issue any such warnings, though at the time of Blansett's flight, the International Air Transport Association, a trade association, had recommended that airlines implement a long schedule of instructions to passengers on the risks of DVT.

Blansett and his close relations sued Continental, alleging that it was liable for Blansett's injury under article 17 of the Warsaw Convention, to which the United States is a signatory. Under article 17, an airline is responsible for injuries to passengers on an international flight where the injury results from an "accident." The district court denied Continental's motion to dismiss under Fed. R. Civ. P. 12(b)(6), concluding that if Continental's failure to provide DVT warnings and instructions was an "unreasonable deviation from industry standards," it would be an "accident" under the Convention. We now consider Continental's interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), on the issue of article 17's proper meaning and application.

We review a rule 12(b)(6) ruling *de novo*. *See, e.g., Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 246 (5th Cir.1997). We assume the truth of all pleaded facts and review purely legal issues *de novo*. Concluding that Continental's failure to

provide DVT warnings and instructions could not have constituted an "accident" under article 17, we reverse and remand.

II.

Article 17 imposes liability on an air carrier for a passenger's death or bodily injury in connection with an international flight. It provides in relevant part:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3000, 1934 WL 29042.

The pertinent question, as we have said, is whether Continental's failure to provide warnings and instructions concerning DVT could have constituted a covered "accident" under article 17. Because the Convention was written in French and against the background of French law, the Supreme Court has looked to French law to interpret the meaning of "accident" in article 17. *Air France v. Saks*, 470 U.S. 392, 400 (1985). In French law, "accident" is usually given to mean a "fortuitous, unexpected, unusual, or unintended event." *Id.* The Court noted, accordingly, that an accident under article 17 is an "unexpected or unusual event. . . ." *Id.*

The Convention speaks of an "accident which caused" an injury rather than an accident that *is* an injury. *Id.* at 398, 105 S. Ct. 1338. Accordingly, a qualifying "unusual or unexpected event" must be distinct from "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Id.* at 405, 406, 105 S. Ct. 1338. For instance, where normal pressurization of the aircraft hull

caused hearing damages to an unusually sensitive passenger, the occurrence of the injury was not an "accident," however unusual or unexpected. *Id.* An "unusual or unexpected event" that qualifies under article 17 must be part of the "chain of causes" leading to an injury. *Id.* at 406, 105 S. Ct. 1338. So, it need not account wholly for the injury but must have been a significant part of the cause.

In *Husain v. Olympic Airways*, 124 S. Ct. 1221, 1227-30 (2004), the Court concluded that, under some circumstances, an "accident" may constitute an omission or refusal to act. In *Husain*, a passenger with an allergy to smoke asked to be reseated when smoke from another section of the plane impinged his seat in a nominally smoke-free area. The crew refused three times to reseat him, even though other seats were available, and as a result of the smoke, he suffered ~~an~~ allergic reaction and died. The Court held that the airline's refusals constituted a qualifying "unusual or unexpected event" under article 17. *Id.* at 1230.

III.

The situation in the instant case differs markedly from that in *Husain.* Here, no request was made of the airline; the flight staff was entirely passive. The Supreme Court noted that facts similar to those here are at least distinguishable from those in *Husain.* Justice Scalia's dissent, *id.* at 1230, 1231 (Scalia, J., dissenting), pointed to decisions in several foreign jurisdictions concluding that a failure to warn and instruct of DVT risks is not an "event" under article 17. The Court stated that the failure to give warning in the foreign Warsaw Convention cases involving DVT, as distinguished from a specific refusal to lend requested aid in *Husain*, was enough to prevent conflict between them. *Id.* at 1229 n. 9.

That is to say, the Court specifically left open the question now before us, even as it supplied the general rules for the detection of qualifying "accidents" under article 17. In this

case, as the Court did in *Husain*, we consider whether certain omissions may constitute an "accident" under article 17.

The district court held, "An airline's violation of an Industry standard of care, alone, can be an 'unusual or unexpected event or happening that is external to the passenger,' ... and thus an 'accident.'" *Blansett v. Cont'l Airlines, Inc.*, 246 F. Supp. 2d 596, 601 (S.D. Tex. 2002). Accordingly, the court would have left it to the jury to determine whether Continental's failure to provide the suggested DVT warnings was an "unexpected and unreasonable departure from routine industry procedure," and thus necessarily an accident under the Convention. *Id.* at 602. In so holding, the court wished to compel airlines to "keep up with reasonable and practical industry practices." *Id.* at 601.

In allowing a finding of an "unreasonable" departure from "airline standards" to establish an unusual and unexpected event, the district court's approach resembles that of the Ninth Circuit, which held, in its iteration of *Husain* that preceded the Supreme Court's review, that "[t]he failure to act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17 so long as *reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not interfere with the normal, expected operation of the airplane.*" *Husain v. Olympic Airways*, 316 F.3d 829, 837 (9th Cir.2002) (emphasis added), *aff'd*, 124 S. Ct. 1221 (2004).[2] The latter part of this formulation echoes formulations of the law of negligence in torts. Although the Supreme Court ultimately affirmed that Olympic Airways' refusal to aid the plaintiff

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[2] *See also Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 665 (S.D.N.Y. 2001) ("Any major deviation from a standard articulated in recognized practices and procedures represents the exceptional case—the unusual or unexpected happening.")

was an "accident," the Court declined to base its analysis on language of reasonableness or unreasonableness.

Likewise, we reject the district court's use of an "unreasonable departure" approach here. Inasmuch as the court called for the consideration whether Continental's conduct was an accident merely because it was "unreasonable," it was in error.

The Blansetts accept that the district court's choice of language was inapt, but they argue nonetheless that they can demonstrate that Continental's failure to give DVT warnings was an "unusual and unexpected event" merely because it was departure from standard practice within the airline industry. For purposes of this appeal, we assume the truth of the Blansetts' allegation that Continental's failure to provide DVT warnings as part of its battery of pre-flight instructions is a departure from an "industry standard."

As we have said, the Supreme Court has held that some kinds of inaction can constitute an "accident." In *Husain*, specific refusals to render requested aid constituted an "unexpected or unusual event." We take note also of the Court's mention of the example proffered by the district judge *a quo* in another case, in which he speculated that it would be an "unusual and unexpected event" if an air crew decided not to divert a flight to save the life of a passenger who suddenly became ill. *Husain*, 124 S. Ct. at 1229 (citing *McCaskey v. Cont'l Airlines, Inc.*, 159 F. Supp. 2d 562, 574 (S.D. Tex. 2001)). In *Husain*[3] and the *McCaskey* hypo-

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[3] As the United Kingdom Court of Appeals observed with respect to *Husain*,

> "[t]he refusal of the flight attendant to move Dr. Hanson cannot properly be considered *mere inertia, or a non-event.* It was a refusal to provide an alternative seat which formed part of a more complex incident, whereby Dr. Hanson was exposed to smoke in circumstances that can properly be described as unusual and unexpected." *Deep Vein Thrombosis & Air Travel Litig.*, 2003 WL 21353471,

thetical, unusual circumstances existed to elevate the willing inaction of airline personnel from mere inertia—from a *non-event*—to an event both "unexpected and unusual."[4]

No such circumstances were thrust on the flight crew in the present case, and their compliance with the regular policy of their airline was hardly unexpected. Rather, the Blansetts allege that the "unexpected" nature of the alleged event arose not from the choices of the flight attendants, but from the Continental policymakers who decided not to mandate DVT warnings on Continental flights.

The Blansetts reason that though this decision occurred at a time and place distant from Blansett's flight, article 17 is to be "applied flexibly" after "assessment of all the circumstances surrounding a passenger's injuries. . . ." *See Saks*, 470 U.S. at 405. It is appropriate to consider the deliberate perpetuation of company-wide policies as potential "events" within the context of the individual flights in which they are given effect. We may accordingly compare the instructions given on Continental flights with those customarily given within the airline industry generally, in gauging whether Continental's deliberate choice was "unusual and unexpected."

Again, we assume, for purposes of this appeal, that a failure to warn of DVT is a departure from "an industry standard of care."[5] But, we will not depart from the demon-

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¶ 50 (emphasis added); *see also Qantas Ltd. v. Povey*, [2003] VSCA 227, ¶ 17, 2003 WL 23000692, ¶ 17 (Dec. 23, 2003).

[4] Judge Dennis disagrees with the mere inertia/inertia plus unusual circumstances dichotomy drawn by the majority because: (1) it is not necessary to the resolution of this case, (2) the Supreme Court left the issue open in *Husain*, and (3) the potential ramifications of distinguishing between different types of inaction are not clear.

[5] As the district court noted, he relied on the testimony of an expert witness, Farrol Kahn, who was of the opinion that failure to provide DVT warnings departed from industry custom. *McCaskey*, 246 F. Supp. 2d at 601. Kahn noted that at the time of Blansett's injury, five of the ten most-

strated will of the Supreme Court by creating a *per se* rule that any departure from an industry standard of care must be an "accident." In *Husain*, 124 S.Ct. at 1230, the Court again emphasized that the appropriate test for article 17's application under every set of relevant facts is whether there was an "unexpected or unusual event." Some departures from an "industry standard" might be qualifying accidents under Article 17, and some may not.

Continental's failure to warn of DVT was not an "unusual or unexpected event" and not a qualifying "accident." Though many international carriers in 2001 included DVT warnings, it is undisputed that many did not. Moreover, Continental's battery of warnings was in accord with the policies of the Federal Aviation Administration ("FAA"), which prescribes what warnings airlines should issue to passengers.

In *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 2004), we held that the warnings reasonably required to be made by an airline are those enumerated by the FAA, and no others.[6] We noted that the balance of warnings required by the government is the product of its careful judgment. For example, "Any warning that passengers should not stay in their seats, but should instead move about to prevent DVT, would necessarily conflict with any federal determination that, all things considered, passengers are safer in their seats." *Id.* at 385. We noted also that the courts' requirement of other warnings would dilute the impact of warnings that are required by the FAA.

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traveled international airlines provided information and instructions to passengers about DVT. *Id.* at 602.

[6] "[F]ederal regulations do not require warnings to passengers about the risks of DVT or methods for preventing this condition." *Witty*, 366 F.3d at 385. Therefore, we concluded that in a negligence action, an airline "cannot be held liable for failing to provide warnings or instructions." *Id.*

Though *Witty* does not decide this case, because its lesson directly applies only to negligence causes of action, it is nonetheless instructive. It was not an unexpected or unusual decision for Continental merely to cleave to the exclusive list of warnings required of it by the agency that has regulatory jurisdiction over its flights.

Ultimately, no jury may be permitted to find that Continental's failure to warn of DVT constituted an "accident" under article 17. Continental's policy was far from unique in 2001 and was fully in accord with the expectations of the FAA. Its procedures were neither unexpected nor unusual.

The order appealed from is REVERSED, and this matter is REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

[Filed Nov. 18, 2002]

Civil Action No. G-02-061

MICHAEL "SHAWN" BLANSETT AND MODESTA N. BLANSETT, Individually and as Next Friend OF MCKENNA BLANSETT and BLAKE BLANSETT, Minors

Plaintiffs,

v.

CONTINENTAL AIRLINES, INC.

Defendant.

ORDER DENYING DEFENDANT CONTINENTAL AIRLINES, INC.'S MOTION TO DISMISS PLAINTIFFS' CLAIMS BASED ON FAILURE TO WARN AND ORDERING PLAINTIFFS TO RESPOND TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS BASED ON FAILURE TO WARN

Plaintiffs Michael "Shawn" Blansett and Modesta Blansett (collectively "the Blansetts") bring this lawsuit against Defendant Continental Airlines, Inc. ("Continental") seeking to recover damages under the Warsaw Convention[1] for injuries allegedly sustained by Shawn Blansett while riding as a passenger aboard a Continental Airlines flight from

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 3014 T.S. No. 876 (1934), note following 49 U.S.C. § 40105.

Houston, Texas to London, England on June 18, 2001. Specifically, Plaintiffs aver that Shawn Blansett suffered a debilitating cerebral stroke approximately one hour before arriving in London that was ostensibly caused by a blood clot that formed during the lengthy flight, a phenomenon typically referred to as "Deep Venous Thrombosis Syndrome" or "Economy Class Syndrome." Plaintiffs further allege that Continental never warned or advised Shawn Blansett of the likelihood of developing a blood clot in the lower extremities, nor allowed an onboard physician to examine or treat Shawn Blansett after he became visibly ill, nor consulted with any third-party medical advice service regarding Shawn Blansett's condition, nor relayed critical information to the London ambulance and hospital personnel that eventually treated Shawn Blansett. As a result of this stroke, Plaintiffs claim that 36-year-old Shawn Blansett, who was once an able-bodied husband, father and corporate executive earning a six-figure salary, is now bound to a wheelchair, unable to walk or talk normally, or even take care of his own basic needs. On the basis of these events, Plaintiffs filed suit in this court on January 25, 2002.

On July 19, 2002, Continental filed a Motion for Judgment as a Matter of Law on Plaintiffs' Claims Based on Failure to Warn.[2] Continental's Motion asks this Court to dismiss the

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[2] In their Original Complaint, filed on January 25, 2002, Plaintiffs alleged that "[a]n 'accident,' meaning un unexpected or unusual condition external to plaintiff, occurred when Continental failed to warn, advise and/or take adequate precautions to inform about and/or prevent Deep Venous Thrombosis ('DVT') on its international flight. This action and/or inaction constituted an 'accident' under the [Warsaw] Convention because it was an unreasonable application of routine procedures or operations, was unexpected or unusual, was external to the plaintiff, and was not caused solely by plaintiff's own conduct or physical condition. Moreover, Continental had *actual* knowledge of the risk of contracting DVT during lengthy flights and failed to warn, advise and/or take adequate precautions to protect its passengers." Pls.' Original Comp. at

Blansetts' failure to warn claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure, or to grant partial summary judgment against the Blansetts on these claims. On October 15, 2002, the Blansetts filed Plaintiffs' First Amended Complaint, revising somewhat their failure-to-warn claims.[3] Also on October 15, 2002, the Blansetts timely responded to Continental's Motion for Judgment as a Matter of Law on Plaintiffs' Claims Based on Failure to Warn. Continental requested and was granted leave to file a Reply to Plaintiffs' Response. Continental filed its Reply on October 18, 2002. For the reasons articulated below, Continental's Motion to Dismiss Plaintiffs' Claims Based on Failure to Warn is DENIED, and Plaintiffs are ORDERED to respond within fifteen (15) days of this Order to Continental's alternative Motion for Partial Summary Judgment on Plaintiffs' Claims Based on Failure to Warn.

¶19. In the next paragraph, Plaintiffs again alleged that "[b]y failing to warn . . . Continental carried out its routine procedures in an unreasonable manner." *Id.* at ¶20.

[3] Plaintiffs' First Amended Complaint changes "unexpected or unusual condition" in paragraph 19 to "unexpected or unusual event or happening," and adds a paragraph elaborating on the failure-to-warn claims. *See* Pls.' First Am. Comp. at ¶19, 20. The added paragraph states that "[u]pon information and belief, it is the custom, rule and/or procedure among international long-haul air carriers to warn, advise and/or take adequate precautions to inform passengers of the risk of DVT. Accordingly, an 'accident' as that term is understood under the Warsaw Convention occurred when Continental failed to warn, advise and/or take adequate precautions to inform plaintiff of the risk of contracting DVT because such failure was an abnormal operation of the carrier and/or an unreasonable application of routine procedures and thereby unusual and unexpected." *Id.* at ¶20.

I.

A. Motion to Dismiss Under Rule 12(b)(6)

A party is entitled to dismissal under Fed. R. Civ. P. 12(b)(6) when an opposing party fails to state a claim upon which relief may be granted. When considering a 12(b)(6) motion, the Court accepts as true all well-pleaded allegations in the complaint, and views them in a light most favorable to the plaintiff. *See Malina v. Gonzales*, 994 F.2d 1121, 1125 (5th Cir 1993). "However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). Unlike a motion for summary judgment, a motion to dismiss should be granted only when it appears without a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *Home Capital Collateral, Inc. v. FDIC*, 96 F.3d 760, 764 (5th Cir. 1996).

As this Court has already held, the Warsaw Convention, "an international treaty governing 'all international transportation of persons, baggage, or goods performed by aircraft for hire,'" provides the exclusive cause of action and remedy for the Blansetts' claims against Continental. *See Blansett v. Continental Airlines, Inc.*, 203 F. Supp. 2d 736, 744 (S.D. Tex. 2002) (Kent, J.) (quoting *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 162, 119 S. Ct. 662, 668, 142 L. Ed. 2d 576 (1999)). In order to prevail on a claim under the Warsaw Convention, a plaintiff must prove that (1) an "accident" (2) "took place on board the aircraft or in the course of operations of embarking or disembarking," (3) which "caused" (4) an "injury." *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 569 (S.D. Tex. 2001) (Kent, J.) (citing *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535-36, 111 S. Ct. 1489, 1494, 113 L. Ed. 2d 569 (1991)). In the Motion now before

the Court, Continental seeks dismissal of the Blansetts' claim that an accident occurred when Continental failed to warn passengers on the transatlantic flight of the risk of developing Deep Venous Thrombosis ("DVT").

The essential predicate of carrier liability under the Warsaw Convention is the occurrence of an "accident." *McCaskey*, 159 F. Supp. 2d at 570 (citing *Wallace v. Korean Air*, 214 F.3d 293, 297 (2d Cir. 2000), *cert. denied*, 531 U.S. 1144, 121 S. Ct. 1079, 148 L. Ed. 2d 955 (2001). For purposes of the Warsaw Convention, an accident is defined as "an unusual or unexpected event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405, 105 S. Ct. 1338, 1345, 84 L. Ed. 2d 289 (1985). Although the Supreme Court instructed that this definition should be "flexibly applied after assessment of all the circumstances surrounding a passenger's injuries," it cautioned that when an injury "indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident . . . ." *Id.* at 405-06, 105 S. Ct. at 1345; *see, e.g.*, *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 133 (3d Cir. 1984) (sitting in an airline seat during a normal flight which aggravated the passenger's hiatal hernia is not an "accident"); *Scherer v. Pan American World Airways, Inc.*, 387 N.Y.S.2d 580, 581 (App. Div. 1976) (sitting in an airline seat during a normal flight which aggravated the passenger's thrombophlebitis is not an "accident") (both cited with approval in *Saks*, 470 U.S. at 405, 105 S. Ct. at 1345).

Guided by *Saks*, many courts have attempted to draw the line between what is an accident and what is not. Finding the appropriate line has become even more critical since the Supreme Court held that the Warsaw Convention provides the exclusive remedy for injuries within its scope. *See Tseng*, 525 U.S. at 176, 119 S. Ct. at 675. Thus, if a passenger is injured on a flight that falls under the Warsaw Convention,

and a court holds that the injury was not caused by an "accident," the passenger cannot recover. *See id.*

Continental argues that sitting in an airplane during a normal flight, which causes a passenger to develop DVT, cannot be an accident. *Cf. Abramson*, 739 F.2d at 133 (sitting in an airline seat during a normal flight which aggravated the passenger's hiatal hernia is not an accident); *Margrave v. British Airways*, 643 F. Supp. 510, 511 (S.D.N.Y. 1986) (sitting in an airline seat for a prolonged period of time which caused the passenger's back injury is not an accident, but the bomb threat which caused the prolonged sitting is an accident); *Scherer*, 387 N.Y.S.2d at 581 (sitting in an airline seat during a normal flight which aggravated the passenger's thrombophlebitis is not an accident). This Court is willing to accept for the sake of argument that these cases show that sitting in an aircraft during a normal flight is not an accident. Thus, injuries sustained merely from sitting during a normal flight are not compensable under the Warsaw Convention.

From the conclusion that merely sitting does not constitute an accident, Continental extrapolates that failing to warn of the risk associated with merely sitting cannot be an accident either. The Court respectfully disagrees. The Blansetts allege that Continental violated a "custom, rule, and/or procedure among international long-haul carriers [by failing] to warn, advise and/or take adequate precautions to inform passengers of the risk of DVT." Pls.' First Am. Compl. at ¶ 20. Many courts have recognized that failing to carry out routine procedures in the usual way can constitute an accident under the Warsaw Convention. *See, e.g., Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 143 (2d Cir. 1998) (applying a hot compress to relieve ear pain, which is a routine procedure, can be an accident if the water is excessively hot); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 669 (S.D.N.Y. 2001) (failing to divert an airplane when a passenger has a heart attack can be an accident if it "contravenes

the airline's established customs, rules or procedures"); *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1134-35 (N.D. Cal. 2000) (failing to allow an asthmatic passenger to move away from cigarette smoke, in contravention of industry standards and airline policies, is an accident). Thus, the Blansetts argue that even if merely sitting does not constitute an accident, failing to warn of the dangers of merely sitting can constitute an accident if the failure violates "accepted procedures and rules."[4] *See Husain*, 116 F. Supp. 2d at 1134.

In response, Continental argues that it did not have a duty to warn passengers of the risk of developing DVT. *See Sprayregen v. American Airlines, Inc.*, 570 F. Supp. 16, 17 (S.D.N.Y. 1983) (holding that the airline had no duty to warn passengers of the potential hazards of flying with a head cold). Similarly, Continental argues that its failure to warn is irrelevant to the accident inquiry. *Cf. Magan v. Lufthansa German Airlines*, 181 F. Supp. 2d 396, 402-03 (S.D.N.Y. 2002) (holding that ordinary turbulence is not an accident and that the flight crews' failure to knock on the lavatory door to warn the plaintiff of the turbulence was irrelevant to the accident inquiry). The *Sprayregen* is inapposite; it involved an injury on a domestic flight that was governed by negli-

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[4] Although no United States case addresses the specific question whether failing to warn of the risk of developing DVT is an accident, two recent foreign cases, cited by Continental, do. In *Van Luin v. KLM Airlines*, the District Court of New South Wales at Sydney held that failing to warn or advise passengers regarding the risk of developing DVT is not an accident under the Warsaw Convention. In *McDonald v. Korean Air & China Travel, Inc.*, the Ontario Superior Court of Justice reached the same conclusion. Both cases apply the *Saks* accident definition, but neither analyzes whether failing to follow established procedures may constitute an accident. Because these cases do not address the specific rationale proffered by the Blansetts why failure to warn of DVT is an accident, this Court respectfully does not follow these decisions of its sister signatories.

gence law rather than by the Warsaw Convention. Under the Warsaw Convention, whether Continental had a duty to warn passengers of the risk of developing DVT is not the proper inquiry; whether Continental's failure to warn was an unusual or unexpected event external to the passenger is. *See Husain*, 116 F. Supp. 2d at 1134 ("When a passenger boards an airplane, he or she should be able to expect that the flight crew will comply with accepted procedures and rules. A failure to do so is unexpected."). Furthermore, to the extent *Magan* holds that failing to warn passengers of particular risks is never relevant to the accident inquiry, the Court declines to follow it. But the Court maintains that this is not *Magan*'s holding. The *Magan* court specifically mentioned that the captain turned on the seat belt sign and made an announcement to the passengers to keep their seat belts fastened. *Id.* at 403 n.8. The plaintiff's argument was that the flight crew should have knocked on the lavatory door to personally warn him of the anticipated turbulence. *Id.* To the extent *Magan* holds that the flight crews' failure to warn in that particular circumstance was irrelevant to the accident inquiry, the Court distinguishes *Magan* on its facts.

The Blansetts allege that Continental's failure to warn of the risk of contracting DVT was an accident because such failure was an abnormal and unreasonable application of routine procedure, and thus, it was unusual and unexpected. Taking these well-pleaded allegations as true, as the Court must in deciding a 12(b)(6) Motion to Dismiss, this Court holds that the Blansetts have alleged a set of facts that, if proven, could support recovery under the Warsaw Convention. Thus, this Court will not dismiss the Blansetts' claims based on Continental's failure to warn of the risk of developing DVT.

B. Motion for Partial Summary Judgment

Having denied Continental's request to dismiss the Blansetts' failure-to-warn claims, the Court now turns to Continental's alternative Motion for Summary Judgment on those claims. Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). When a motion for summary judgment is made, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

Procedurally, the party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553; *see also* Fed. R. Civ. P. 56(c). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *See Matsushita*, 475 U.S. at 585-87, 106 S. Ct. at 1355-56; *Wise v. E.I. DuPont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995).

In the Motion now before the Court, Continental moved to dismiss the Blansetts' failure-to-warn claims, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment as to those claims. On August 2, 2002, the Blansetts requested and this Court granted an extension of time to respond to Continental's Motion because the response would "require substantial factual and expert evidence to reply." Pls.' Mot. to Extend Time at 1. But, when the Blansetts timely responded on October 15, 2002, they included no such "factual and expert evidence." Instead, the Blansetts asked this Court to ignore Continental's request for summary judgment, contending that

Continental did not meet its burden to inform the Court of the basis for its Motion and to identify the absence of a genuine issue of material fact. The Court disagrees and is somewhat frustrated by the Blansetts' failure to substantively respond. The Court must treat Defendant's Motion substantively and therefore ORDERS the Blansetts to *substantively* respond to the summary judgment motion within fifteen (15) days of this Order, or the Court will treat the Motion for Partial Summary Judgment on Plaintiffs' Claims Based on Failure to Warn as unopposed.[5]

II.

For all of the reasons set forth above, the Court hereby respectfully DENIES Defendant Continental Airlines, Inc.'s Motion to Dismiss Plaintiffs' Claims Based on Failure to Warn. The Court hereby ORDERS Plaintiffs to substantively respond to Continental's Motion for Partial Summary Judgment on Plaintiffs' Claims Based on Failure to Warn within fifteen (15) days of this Order, or the Motion will be treated as unopposed. Each Party is to bear its own taxable costs and expenses incurred herein to date, regarding any matter treated in this Order.

IT IS SO ORDERED.

DONE this 18th day of November, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

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[5] *See* S.D. Tex. Local Rule 7.4 ("Failure to respond will be taken as a representation of no opposition.").

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

[Filed Dec. 11, 2002]

Civil Action No. G-02-061

MICHAEL "SHAWN" BLANSETT AND MODESTA N. BLANSETT, Individually and as Next Friends of MCKENNA BLANSETT and BLAKE BLANSETT, Minors

Plaintiffs,

v.

CONTINENTAL AIRLINES, INC.

Defendant.

ORDER DENYING DEFENDANT CONTINENTAL AIRLINES, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS BASED ON FAILURE TO WARN

Plaintiffs Michael "Shawn" Blansett and Modesta Blansett (collectively "the Blansetts") bring this lawsuit against Defendant Continental Airlines, Inc. ("Continental") seeking to recover damages under the Warsaw Convention[1] for injuries allegedly sustained by Shawn Blansett while riding as a passenger aboard a Continental Airlines flight from Houston, Texas to London, England on June 18, 2001. The facts forming the basis of the Blansetts' claims have been set out in several Orders issued by this Court.[2] On July 19, 2002,

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 3014 T.S. No. 876 (1934), note following 49 U.S.C. § 40105.

[2] *See, e.g.*, Blansett v. Continental Airlines, Inc., 204 F. Supp. 2d 999. 1000 (S.D. Tex. 2002) (Kent, J.). Plaintiffs' allege the following: Shawn

Continental filed a Motion for Judgment as a Matter of Law on Plaintiffs' Claims Based on Failure to Warn.[3] Continental's Motion asked this Court to dismiss the Blansett's failure-to-warn claims under Rule 12(b)(6) of the Federal

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Blansett suffered a debilitating cerebral stroke approximately one hour before arriving in London. The stroke was ostensibly caused by a blood clot that formed during the lengthy flight, a phenomenon typically referred to as "Deep Venous Thrombosis Syndrome" or "Economy Class Syndrome." Continental never warned or advised Shawn Blansett of the likelihood of developing a blood clot in the lower extremities, nor allowed an onboard physician to examine or treat Shawn Blansett after he became visibly ill, nor consulted with any third-party medical advice regarding Shawn Blansett's condition, nor relayed critical information to the London ambulance and hospital personnel that eventually treated Shawn Blansett. As a result of this stroke, 36 year-old Shawn Blansett, who was once an able-bodied husband, father, and corporate executive earning a six-figure salary, is now bound to a wheelchair, unable to walk or talk normally, or even take care of his own needs.

[3] Plaintiffs allege that "[a]n 'accident,' meaning an unexpected or unusual event or happening external to plaintiff, occurred when Continental failed to warn, advise and/or take adequate precautions to inform about and/or prevent Deep Venous Thrombosis ('DVT') on its international flight. This action and/or inaction constituted an 'accident' under the [Warsaw] Convention because it was an unreasonable application of routine procedures or operations, was unexpected or unusual, was external to plaintiff, and was not caused solely by plaintiff's own conduct or physical condition. Moreover, Continental had *actual* knowledge of the risk of contracting DVT during lengthy flights and failed to warn, advise and/or take adequate precautions to protect its passengers." Pls.' First Am. Comp. at ¶ 19. The Complaint further alleges that "[u]pon information and belief it is the custom, rule and/or procedure among international long-haul air carriers to warn, advise and/or take adequate precautions to inform passengers of the risk of DVT. Accordingly, an 'accident' as that term is understood under the Warsaw Convention occurred when Continental failed to warn, advise and/or take adequate precautions to inform plaintiff of the risk of contracting DVT because such failure was an abnormal operation of the carrier and/or an unreasonable application of routine procedures and thereby unusual and unexpected." *Id.* at ¶ 20.

Rules of Civil Procedure, or to grant partial summary judgment against the Blansetts on these claims. On November 18, 2002, this Court denied Continental's Motion to Dismiss, determining that the Blansetts' failure-to-warn allegations stated a claim upon which relief can be granted. In the November 18, 2002 Order, this Court allowed the Blansetts an additional fifteen (15) days to respond to the Motion for Partial Summary Judgment. On December 3, 2002, the Blansetts timely responded to Continental's Motion for Partial Summary Judgment on Plaintiffs' Claims Based on Failure to Warn, and on December 9, 2002 Continental filed a Reply. The exhaustive briefing has thus placed the failure-to-warn issue squarely before the Court for appropriate dispositive analysis, and the Court thanks the Parties for their excellent advocacy. For the reason articulated below, Continental's Motion for Partial Summary Judgment on Plaintiffs' Claims Based on Failure to Warn is respectfully DENIED.

I.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317,323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). When a motion for summary judgment is made, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,250, 106 S. Ct. 2505, 2510, 91 L. Ed 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id.*, 477 U.S. at 248, 106 S. Ct. at 2510. The mere *existence* of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.*, 477 U.S. at 247-48, 106 S. Ct. at 2510. If the evidence is such

that a reasonable fact finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *Dixon v. State Farm Fire & Cas. Co.*, 799 F. Supp. 691, 694 (S.D. Tex 1992) (noting that summary judgment is inappropriate if the evidence could lead to different factual findings and conclusions). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513.

Procedurally, the party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553; *see also* Fed. R. Civ. P. 56(c). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *See Matsushita*, 475 U.S. at 585-87, 106 S. Ct. at 1355-56. However, to meet its burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts, "but instead, must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.*, 475 U.S. at 586-87, 106 S. Ct. at 1355-56 (quoting Fed. R. Civ. P. 56(e)).

II.

This Court has already held that the Warsaw Convention, "an international treaty governing 'all international transportation of persons, baggage, or goods performed by aircraft for hire,'" provides the exclusive cause of action and remedy for the Blansetts' claims against Continental. *See Blansett v. Continental Airlines, Inc.*, 203 F. Supp. 2d 736, 744 (S.D. Tex. 2002) (Kent, J.) (quoting *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 162, 119 S. Ct. 662, 668, 142 L. Ed. 2d 576 (1999)). In order to prevail on a claim under the Warsaw

Convention, a plaintiff must prove that (1) an "accident" (2) "took place on board the aircraft or in the course of operations of embarking or disembarking," (3) which "caused" (4) an "injury." *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 569 (S.D. Tex. 2001) (Kent, J.) (citing *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535-56, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991)). In its November 18, 2002 Order, this Court determined that the Blansetts' allegation that an accident occurred when Continental failed to warn passengers on the transatlantic flight of the risk of developing Deep Venous Thrombosis ("DVT") stated a claim upon which relief can be granted. This Court's determination was based on case law holding that an airline's failure to carry out routine procedures in the usual manner can constitute an accident under the Warsaw Convention. *See. e.g., Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 143 (2d. Cir. 1998); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 669 (S.D.N.Y. 2001); *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121. 1134-35 (N.D. Cal. 2000). It was somewhat unclear in the Complaint whether the Blansetts were arguing that Continental's failure to warn about DVT was (1) a failure to follow its *own* routine procedures, (2) a failure to follow the routine procedures of the *industry*, or (3) both. The Blansetts' summary judgment Response makes clear that the failure-to-warn claims are based solely on Continental's failure to follow the alleged *industry* custom among international long-haul carriers to warn of the risk of DVT.[4]

Based on this clarification, the Court briefly revisits whether failure to follow *industry* custom may constitute an

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[4] The Blansetts allege that "[a]bsolutely, evidence exists raising a genuine fact issue as to whether Continental violated the industry custom of long-haul, carriers by failing to warn its passengers of the risk of developing [DVT]." Pls.' Dec. 3, 2002 Resp. at p.1.

accident. The United States Supreme Court has defined a Warsaw Convention accident as "an unusual or unexpected event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405, 105 S. Ct. 1338, 1345, 84 L. Ed. 2d 289 (1985). An airline's failure to carry out routine procedures in the usual manner may constitute an accident. *See e.g., Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138. 143 (2d Cir. 1998) (applying a hot compress to relieve ear pain, which is a routine procedure, can be an accident if the water is excessively hot); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 669 (S.D.N.Y. 2001) (failing to divert an airplane when a passenger has a heart attack can be an accident if it "contravenes the airline's established customs, rules or procedures"); *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1134-35 (N.D. Cal. 2000) (failing to allow an asthmatic passenger to move away from cigarette smoke, in contravention of industry standards and airline policies, is an accident). The *Fulop* and *Husain* courts clearly considered failure to properly carry out the routine procedures of the *industry* to be an accident. The *Husain* court stated:

> [u]nder no reasonable interpretation of the facts can one conclude that [the flight attendant's] failure to assist [the decedent] was expected or usual. The Court has heard extensive testimony on the *standard of care for flight attendants* in situations such as this, and concludes that [the flight attendant] acted in an unexpected and unusual manner in several respects.
>
> First, the *recognized standard of care for flight attendants during international air travel* demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons . . . . .

> Third, not only did [the flight attendant's] failure to act violate the *industry standard of care*, it also violated Olympic Airways' policy.

Husain, 116 F. Supp. 2d at 1132 (emphasis added). The *Husain* court repeatedly notes that the flight attendant's behavior was unusual and unexpected because she violated the "industry standard of care." *See, e.g., id.* at 1133 (reasoning that the decedent's expectation that he would be allowed to switch seats was even more reasonable "in light of the normal operating procedures of international carriers" and stating that the flight attendant violated the "industry standard of care" by failing to allow him to move.) Similarly, the *Fulop* court states:

> [i]t also requires no reliance on authority that, viewing the circumstances objectively as the *Saks* inquiry demands, the ordinary traveler reasonably would expect that-as-the normal, usual and expected response to such urgencies, and as a fair balancing of interests and risks characteristic of air travel-in handling life-threatening exigencies, airlines rendering services as common carriers would be particularly scrupulous and exacting in complying with their own *industry norms*, internal policies and procedures, and general standards of care.

Fulop, 175 F. Supp. 2d at 665 (emphasis added). Although *Husain*'s and *Fulop*'s accident analyses were based on violations of the airlines' internal procedures *and* violations of industry customs, this Court specifically concludes that airlines' violation of an industry standard of care, alone, can be "an unusual or unexpected event or happening that is external to the passenger," *see Saks*, 470 U.S. at 405, 105 S. Ct. at 1345, and thus, an "accident." To hold otherwise would have the ironic result of rewarding individual airlines for adopting an "ostrich" approach of failing to institute routine safety procedures in compliance with generally recognized industry standards of care. Safety in a technically

evolving industry, such as air travel, can and *must* keep up with reasonable and practical industry practices. This is especially true, where, as here no real expense is even involved. This case does not require an expensive or intrusive retrofit or equipment exchange. It involves nothing more than the reprinting of safety placards and a thirty-second oral announcement once or twice in each long flight.

III.

Under the Federal Rules of Civil Procedure, an affidavit opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein" Fed. R. Civ. P. 56(e). An expert's affidavit may raise a material question of fact if the expert sets forth more than mere conclusory opinions. *See Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25-26 (2d Cir. 1994). In addition, an affidavit stating the facts upon which an expert relies can satisfy Rule 56(e) even if the corresponding data is not attached. *See id.* at 25.

The Blansetts present the sworn affidavit of aviation health expert Farrol Kahn, director of the Aviation Health Institute, to establish a fact issue regarding the existence of an industry custom to warn of the risk of DVT.[5] Mr. Kahn states, "In my

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[5] The Blansetts present Mr. Kahn as an expert on aviation health and the aviation industry, specifically the aviation industry's response to DVT. In its Reply, Continental questions, Mr. Kahn's qualifications, stating that "[t]he credentials submitted by Mr. Kahn fail to demonstrate that he is a qualified expert in many, if not all, of the subjects on which he opines." Def.'s Dec. 9, 2002 Reply at p.4 n.5. In his affidavit, Mr. Kahn identifies numerous publications he has authored and presentations he has made to various bodies including the World Health Organization and the British Parliament regarding DVT and the aviation industry. In addition, Mr. Kahn is a delegate to the World Health Organization's Deep Venous Thrombosis study. For the purposes of this Motion, this Court concludes

opinion, at the time of Mr. Blansett's injury, Continental, by providing no information, warning or advice regarding DVT in any form, manner or medium, violated international aviation industry custom." Aff. of Farrol Kahn at ¶ 16. Mr. Kahn presents a memorandum issued *months before* Shawn Blansett's injury by the International Air Transport Association ("IATA")[6] recommending that its members inform passengers of the risk of DVT and of ways to avoid developing DVT.[7] In addition, Mr. Kahn states that the time of Shawn Blansett's stroke in June of 2001, five of the ten most-traveled airlines, provided information to passengers regarding the risk of DVT.

Accepting all of the evidence and drawing all justifiable inferences in the Blansetts' favor, this Court determines that a reasonable fact-finder, a jury in this case, could determine that Continental's failure to warn passengers on its transatlantic flight of the risk of DVT was an unexpected and unreasonable deviation from routine industry procedure, and thus, an accident under the Warsaw Convention. In this rapidly emerging area of law and medicine, a full adjudication of the issues, enhanced by the wisdom and guidance

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that Mr. Kahn's knowledge and experience regarding DVT and the aviation industry make his opinions on the subject manifestly relevant and reliable. *See* Fed. R. Evid. 702; *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 1176, 143 L. Ed. 2d 238 (1999).

[6] The IATA is an industry association of 280 international air carriers, comprising 95% of scheduled international air travel. Continental is a member of the IATA.

[7] The February 8, 2001 press release states that "[a]t the time of reservation, travellers should be" informed of the risks of DVT and encouraged to seek medical advice if they have certain risk factors. In addition, "[p]rior to boarding and again on board, passengers should be encouraged" to take certain precautionary measures, such as drinking non-alcoholic fluids, wearing loose-clothing, and performing exercises in their seats, to avoid developing DVT.

provided by a jury of the Parties' peers, is needed to resolve this important question.

IV.

For all of the reasons set forth above, the Court hereby respectfully DENIES Defendant Continental Airlines, Inc.'s Motion for Partial Summary Judgment on Plaintiffs' Claims Based on Failure to Warn. Each Party is to bear its own taxable costs and expenses incurred herein to date, regarding any matter treated in this Order.

IT IS SO ORDERED.

DONE this 11th day of December, 2002, at Galveston, Texas.

/s/ Samuel Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

[Filed Mar. 10, 2003]

Civil Action No. G-02-061

MICHAEL "SHAWN" BLANSETT AND MODESTA N. BLANSETT, Individually and as Next Friends of MCKENNA BLANSETT and BLAKE BLANSETT, Minors,

Plaintiffs,

v.

CONTINENTAL AIRLINES, INC.

Defendant.

ORDER OF CERTIFICATION FOR
INTERLOCUTORY APPEAL

Before the Court is plaintiffs' and defendant's agreed motion to certify a 1292(b) interlocutory appeal.

The Court finds that the question

> Does a failure to warn an airline passenger of the possibility of developing Deep Vein Thrombosis constitute an "accident" under the Warsaw Convention?

involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of this litigation.

It is ORDERED that the parties' agreed motion to certify 1292(b) interlocutory appeal is GRANTED.

It is further ORDERED that the Court's orders entered on November 18, 2002 and December 11, 2002 are CERTIFIED

for interlocutory appeal on this question: "Does an alleged failure to warn an airline passenger of the possibility of developing Deep Vein Thrombosis constitute an "accident" under the Warsaw Convention?" The Orders entered on November 18, 2002 and December 11, 2002 are amended to state they "involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation."

It is further ORDERED that all proceedings in this matter are stayed pending the outcome of an interlocutory appeal.

SIGNED March 7, 2003.

/s/ Samuel B. Kent
HON. SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Apr. 23, 2003]

No. 03-16

MICHAEL SHAWN BLANSETT; MODESTA N. BLANSETT, as next friend McKenna Blansett, as next friend Blake Blansett, Individually, and Minors,

Plaintiffs-Respondents-Cross-Petitioners,

versus

CONTINENTAL AIRLINES INC.,

Defendant-Petitioner-Cross-Respondent.

Petitions for Leave to Appeal
from an Interlocutory Order

Before BARKSDALE, DeMOSS, and BENAVIDES, *Circuit Judges*.

BY THE COURT:

IT IS ORDERED that the petition of Continental Airlines, Inc. for leave to appeal from the interlocutory orders of the United States District Court for the Southern District of Texas, Galveston, entered on November 18, 2002, and on December 11, 2002, as each of such orders has been amended by the order entered on March 10, 2003, is GRANTED.

IT IS FURTHER ORDERED that the petition of Michael Shawn Blansett and Modesta N. Blansett for leave to appeal from the interlocutory orders of the United States District

Court for the Southern District of Texas, Galveston, entered on November 18, 2002, and on December 11, 2002, as each of such orders has been amended by the order entered on March 10, 2003, is GRANTED.

IT IS FURTHER ORDERED that the Clerk of this Court shall set a briefing schedule for this appeal such that it can be heard at the next available oral argument session thereafter.

/s/ RHB, HRD, FPB

APPENDIX D

United States Code Annotated

Title 49. Transportation

Subtitle VII—Aviation Programs

Part A—Air Commerce and Safety Subpart III—Safety

Chapter 447—Safety Regulation

§ 44701. General requirements

(a) Promoting safety.—The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing—

(1) minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers;

(2) regulations and minimum standards in the interest of safety for—

(A) inspecting, servicing, and overhauling aircraft, aircraft engines, propellers, and appliances;

(B) equipment and facilities for, and the timing and manner of, the inspecting, servicing, and overhauling; and

(C) a qualified private person, instead of an officer or employee of the Administration, to examine and report on the inspecting, servicing, and overhauling;

(3) regulations required in the interest of safety for the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, including the reserve supply of fuel and oil carried in flight;

(4) regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers; and

(5) regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.

(b) Prescribing minimum safety standards.—The Administrator may prescribe minimum safety standards for–

(1) an air carrier to whom a certificate is issued under section 44705 of this title; and

(2) operating an airport serving any passenger operation of air carrier aircraft designed for at least 31 passenger seats.

(c) Reducing and eliminating accidents.—The Administrator shall carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation. However, the Administrator is not required to give preference either to air transportation or to other air commerce in carrying out this chapter.

(d) Considerations and classification of regulations and standards.—When prescribing a regulation or standard under subsection (a) or (b) of this section or any of sections 44702–44716 of this title, the Administrator shall—

(1) consider—

(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and

(B) differences between air transportation and other air commerce; and

(2) classify a regulation or standard appropriate to the differences between air transportation and other air commerce.

(e) Bilateral exchanges of safety oversight responsibilities.—

(1) In general.—Notwithstanding the provisions of this chapter, the Administrator, pursuant to Article 83 bis of the Convention on International Civil Aviation and by a bilateral agreement with the aeronautical authorities of another country, may exchange with that country all or part of their respective functions and duties with respect to registered aircraft under the following articles of the Convention: Article 12 (Rules of the Air); Article 31 (Certificates of Airworthiness); or Article 32a (Licenses of Personnel).

(2) Relinquishment and acceptance of responsibility.—The Administrator relinquishes responsibility with respect to the functions and duties transferred by the Administrator as specified in the bilateral agreement, under the Articles listed in paragraph (1) for the United States-registered aircraft described in paragraph (4)(A) transferred abroad and accepts responsibility with respect to the functions and duties under those Articles for aircraft registered abroad and described in paragraph (4)(B) that are transferred to the United States.

(3) Conditions.—The Administrator may predicate, in the agreement, the transfer of functions and duties under this subsection on any conditions the Administrator deems necessary and prudent, except that the Administrator may not transfer responsibilities for United States registered aircraft described in paragraph (4)(A) to a country that the Administrator determines is not in compliance with its obligations under international law for the safety oversight of civil aviation.

(4) Registered aircraft defined.—In this subsection, the term "registered aircraft" means—

(A) aircraft registered in the United States and operated pursuant to an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in another country; and

(B) aircraft registered in a foreign country and operated under an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in the United States.

(f) Exemptions.—The Administrator may grant an exemption from a requirement of a regulations prescribed under subsection (a) or (b) of this section or any of sections 44702–44716 of this title if the Administrator finds the exemption is in the public interest.

APPENDIX E

Code of Federal Regulations
Title 14, Volume 2

Title 14—AERONAUTICS AND SPACE

CHAPTER I–FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION (CONTINUED)

PART 121– OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

Subpart A–General

Sec. 121.1 Applicability.

This part prescribes rules governing—

(a) The domestic, flag, and supplemental operations of each person who holds or is required to hold an Air Carrier Certificate or Operating Certificate under part 119 of this chapter.

* * *

Sec. 121.11 Rules applicable to operations in a foreign country.

Each certificate holder shall, while operating an airplane within a foreign country, comply with the air traffic rules of the country concerned and the local airport rules, except where any rule of this part is more restrictive and may be followed without violating the rules of that country.

* * *

Sec. 121.317 Passenger information requirements, smoking prohibitions, and additional seat belt requirements.

(a) Except as provided in paragraph (1) of this section, no person may operate an airplane unless it is equipped with passenger information signs that meet the requirements of

Sec. 25.791 of this chapter. Except as provided in paragraph (1) of this section, the signs must be constructed so that the crewmembers can turn them on and off.

(b) Except as provided in paragraph (1) of this section, the "Fasten Seat Belt" sign shall be turned on during any movement on the surface, for each takeoff, for each landing, and at any other time considered necessary by the pilot in command.

(c) No person may operate an airplane on a flight on which smoking is prohibited by part 252 of this title unless either the "No Smoking" passenger information signs are lighted during the entire flight, or one or more "No Smoking" placards meeting the requirements of Sec. 25.1541 of this chapter are posted during the entire flight segment. If both the lighted signs and the placards are used, the signs must remain lighted during the entire flight segment.

(d) No person may operate a passenger-carrying airplane under this part unless at least one legible sign or placard that reads "Fasten Seat Belt While Seated" is visible from each passenger seat. These signs or placards need not meet the requirements of paragraph (a) of this section.

(e) No person may operate an airplane unless there is installed in each lavatory a sign or placard that reads: "Federal law provides for a penalty of up to $2,000 for tampering with the smoke detector installed in this lavatory." These signs or placards need not meet the requirements of paragraph (a) of this section.

(f) Each passenger required by Sec. 121.311(b) to occupy a seat or berth shall fasten his or her safety belt about him or her and keep it fastened while the "Fasten Seat Belt" sign is lighted.

(g) No person may smoke while a "No Smoking" sign is lighted or while "No Smoking" placards are posted, except as follows:

(1) Supplemental operations. The pilot in command of an airplane engaged in a supplemental operation may authorize smoking on the flight deck (if it is physically separated from any passenger compartment), but not in any of the following situations:

(i) During airplane movement on the surface or during takeoff or landing;

(ii) During scheduled passenger-carrying public charter operations conducted under part 380 of this title; or

(iii) During any operation where smoking is prohibited by part 252 of this title or by international agreement.

(2) Certain intrastate domestic operations. Except during airplane movement on the surface or during takeoff or landing, a pilot in command of an airplane engaged in a domestic operation may authorize smoking on the flight deck (if it is physically separated from the passenger compartment) if—

(i) Smoking on the flight deck is not otherwise prohibited by part 252 of this title;

(ii) The flight is conducted entirely with the same State of the United States (a flight from one place in Hawaii to another place in Hawaii through the airspace over a place outside of Hawaii is not entirely within the same State); and

(iii) The airplane is either not turbo-jet-powered or the airplane is not capable of carrying at least 30 passengers;

(h) No person may smoke in any airplane lavatory.

(i) No person may tamper with, disable, or destroy any smoke detector installed in any airplane lavatory.

(j) On flight segments other than those described in paragraph (c) of this section, the "No Smoking" sign must be turned on during any movement on the surface, for each takeoff, for each landing, and at any other time considered necessary by the pilot in command.

(k) Each passenger shall comply with instructions given him or her by a crewmember regarding compliance with paragraphs (f), (g), (h), and (i) of this section.

(l) A certificate holder may operate a nontransport category airplane type certificated after December 31, 1964, that is manufactured before December 20, 1997, if it is equipped with at least one placard that is legible to each person seated in the cabin that states "Fasten Seat Belt," and if, during any movement on the surface, for each takeoff, for each landing, and at any other time considered necessary by the pilot in command, a crewmember orally instructs the passengers to fasten their seat belts.

* * *

Sec. 121.535 Responsibility for operational control: Flag operations.

* * *

(c) The aircraft dispatcher is responsible for--

(2) Issuing necessary instructions and information for the safety of the flight;

* * *

(f) No pilot may operate an aircraft in a careless or reckless manner so as to endanger life or property.

* * *

Sec. 121.537 Responsibility for operational control: Supplemental operations.

(a) Each certificate holder conducting supplemental operations—

(1) Is responsible for operational control; and

(2) Shall list each person authorized by it to exercise operational control in its operator's manual.

(b) The pilot in command and the director of operations are jointly responsible for the initiation, continuation, diversion, and termination of a flight in compliance with this chapter and the operations specifications. The director of operations may delegate the functions for the initiation, continuation, diversion, and termination of a flight but he may not delegate the responsibility for those functions.

(c) The director of operations is responsible for cancelling, diverting, or delaying a flight if in his opinion or the opinion of the pilot in command the flight cannot operate or continue to operate safely as planned or released. The director of operations is responsible for assuring that each flight is monitored with respect to at least the following:

(1) Departure of the flight from the place of origin and arrival at the place of destination, including intermediate stops and any diversions therefrom.

(2) Maintenance and mechanical delays encountered at places of origin and destination and intermediate stops.

(3) Any known conditions that may adversely affect the safety of flight.

(d) Each pilot in command of an aircraft is, during flight time, in command of the aircraft and crew and is responsible for the safety of the passengers, crewmembers, cargo, and aircraft. The pilot in command has full control and authority in the operation of the aircraft, without limitation, over other

crewmembers and their duties during flight time, whether or not he holds valid certificates authorizing him to perform the duties of those crewmembers.

(e) Each pilot in command of an aircraft is responsible for the preflight planning and the operations of the flight in compliance with this chapter and the operations specifications.

(f) No pilot may operate an aircraft, in a careless or reckless manner, so as to endanger life or property.

* * *

Sec. 121.571 Briefing passengers before takeoff.

(a) Each certificate holder operating a passenger-carrying airplane shall insure that all passengers are orally briefed by the appropriate crewmember as follows:

(1) Before each takeoff, on each of the following:

(i) Smoking. Each passenger shall be briefed on when, where, and under what conditions smoking is prohibited including, but not limited to, any applicable requirements of part 252 of this title). This briefing shall include a statement that the Federal Aviation Regulations require passenger compliance with the lighted passenger information signs, posted placards, areas designated for safety purposes as no smoking areas, and crewmember instructions with regard to those items. The briefing shall also include a statement that Federal law prohibits tampering with, disabling, or destroying any smoke detector in an airplane lavatory; smoking in lavatories; and, when applicable, smoking in passenger compartments.

(ii) The location of emergency exits.

(iii) The use of safety belts, including instructions on how to fasten and unfasten the safety belts. Each passenger shall be briefed on when, where, and under what conditions the safety belt must be fastened about that passenger. This

briefing shall include a statement that the Federal Aviation Regulations require passenger compliance with lighted passenger information signs and crewmember instructions concerning the use of safety belts.

(iv) The location and use of any required emergency flotation means.

* * *

(b) Each certificate holder shall carry on each passenger-carrying airplane, in convenient locations for use of each passenger, printed cards supplementing the oral briefing and containing –

(1) Diagrams of, and methods of operating, the emergency exits; and

(2) Other instructions necessary for use of emergency equipment.